

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

TUESDAY, THE 16TH OCTOBER 2007 / 24TH ASWINA 1929

RFA.No. 102 OF 2004(F)

OS.285/1998 OF I ADDL.SUB COURT, THRISSUR

APPELLANTS 1 TO 4/DEFENDANTS 1 TO 4

1. RAMAKRISHNAN S/O. KUMARAN,
CHIRAYIL HOUSE, CHEMBOOKKAVU VILLAGE AND DESOM,
P.O.CHEMBOOKAVU - 680 020,
THRISSUR DISTRICT.
2. SOBHA, W/O. RAMAKRISHNAN, DO. DO.
3. AJITH S/O. RAMAKRISHNAN, DO. DO.
4. VISWAJITH S/O. RAMAKRISHNAN, DO.

BY ADV. SRI.N.SUBRAMANIAM
SRI.M.UNNIKRISHNA MENON
SRI.M.S.NARAYANAN

RESPONDENTS: PLAINTIFF & DEFTS. 5 & 6

1. JOHNSON S/O. IMBAVU PAUL,
OLARIKKARA DESOM, ARANATUKARA VILLAGE,
TRICHUR TALUK AND DISTRICT.
2. SIMON, S/O. FRANCIS, KUTTIKKADA HOUSE,
THOTTATHIL LANE, CHEMBOOKKAVU VILLAGE,
P.O. CHEMBOOKKAVU - 680 020,
TRICHUR TALUK AND DISTRICT.
3. BIJU, S/O. VARGHESE, VELLATTUKARAN HOUSE
CHEMBOOKKAVU VILLAGE & DESOM,
P.O. CHEMBOOKKAVU - 680 020,
TRICHUR TALUK AND DISTRICT.

BY ADV. SRI.T.KRISHNAN UNNI

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD
ON 18.9.2007, THE COURT ON 16/10/2007, PASSED THE FOLLOWING:

ORDER ON I.A. NO. 515/2004 IN R.F.A. 102/2004

// DISMISSED //

16.10.2007.

SD/-
P.R. RAMAN, JUDGE.

SD/-
V.K. MOHANAN, JUDGE.

// TRUE COPY //

P.S. TO JUDGE.

KNC/-

P.R. RAMAN & V. K. MOHANAN, JJ.
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R.F.A. 102 OF 2004
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DATED THIS, THE 16TH DAY OF OCTOBER, 2007.

J U D G M E N T

Raman, J.

Appellants are defendants 1 to 4 in O.S. 285/1998 on the file of the First Additional Sub Court, Thrissur. The suit was one for realisation of money based on a promissory note. The first respondent herein is the plaintiff in the suit and Respondents 2 and 3 are Defendants 5 and 6.

2. According to the plaintiff, defendants 1 to 4 had executed a promissory note in favour of defendants 5 and 6 or order promising to repay on demand the sum mentioned therein and that defendants 5 and 6 have endorsed the promissory note dated 26.9.1997 in favour of the plaintiff. He is a bona fide holder of the same in due course for valuable consideration. He issued notice demanding the money from the appellants and since there was no response nor payment, the suit was instituted.

3. Defendants 5 and 6 remained ex parte. Defendants 1 to 4 filed a joint written statement denying the execution of any promissory note to defendants 5 and 6. According to them, one Abdul Azeez had entrusted certain vehicles with the third defendant for sale, who sold two cars bearing

Reg. Nos. K.A. 11-M-7878 and KA-11-M-8001 to defendants 5 and 6 in exchange for two other cars, that it is based on the agreement between the third defendant and Abdul Azeez that the cars were entrusted by Abdul Azeez for sale in Kerala, that the third defendant was made to believe by Abdul Azeez that the cars were entrusted by the concerned owners with him for sale and that the third defendant was acting as a mediator only, that later, after the sale, on 24.9.1997 Abdul Azeez was brought to Thrissur by Bangalore-Girinagar Police Officers and the police seized of the above vehicles from concerned persons who were using the same, that a case was pending against Abdul Azees as Crime No. 215/1997 for offence punishable under Section 379 of the Indian Penal Code as he had stolen the cars KA-11-M-8001 Tata Sumo, KA-11-M-8787 Maruthi Estate, KA-11-M-7878 Tata Sterra, KA-11-M-62 Maruthi 800 which were the cars entrusted by him to the third respondent for sale in the course of the business dealings between Azeez and the third defendant, that since defendants 5 and 6 were dispossessed of the vehicles by the seizure, which they purchased through the third defendant, they wanted to get back the money, that there are no business transactions between the plaintiff and defendants 1 to 4, that third defendant is not liable to pay any amount to defendants 5 and 6, since he was only a mediator who was not aware of the fact that the cars were stolen,

that the third respondent is not responsible for the seizure of the vehicles from Respondents 5 and 6 by the Police, that the third defendant did not heed to the unlawful demand of respondents 5 and 6 to pay them the amount which they demanded, that Respondents 5 and 6 influenced the Circle Inspector of Police, Thrissur and obtained an agreement executed by them , that they were forced to put up their thumb impressions and signature on two blank papers and stamp was affixed on one of them, that the blank papers were later converted as a demand promissory note with an arbitrary figure and date, that the promissory note produced along with the plaint is false, concocted and forged one created by cheating, coercion and fraud by defendants 5 and 6 in collusion with the plaintiff and the Circle Inspector of Police, that the handwriting in the promissory note is not that of defendants 1 to 4, that the witnesses said to have seen the signatures in the documents are the henchmen of defendants 5 and 6 and the plaintiff, that there is collusion between the plaintiff and defendants 5 and 6 in filing the suit, that defendants 5 and 6 did not have the financial source to lend a sum of Rs. 7, 75,000/- to defendants 1 to 4, that the plaintiff is their close associate , that they initiated legal proceedings against Abdul Azeez and others at Bangalore for getting back the vehicles seized from them, that defendants 1 to 4 will be initiating criminal proceedings against defendants 5 and 6 and

the plaintiff for cheating, forgery and fraud committed by them, that the plaintiff is barred by limitation and the suit is liable to be dismissed. According to those defendants, the Circle Inspector of Police, Thrissur, summoned the third defendant to his Office and when he met the C.I. of Police at 12.30 P.M. defendants 5 and 6 were also present there, that the Circle Inspector of Police demanded that the third defendant should pay a sum of Rs. 7, 75,000/- to defendants 5 and 6 within six months, but as he was not prepared to listen to the unreasonable and illegal demand, he was threatened with dire consequence and physical assault, that he was made to stand in the police station till midnight, that defendants 1, 2 and 4 being his father, mother and brother, went to the police station and in the presence of them, the Circle Inspector and his subordinates abused him in obscene language and pulled, pushed and physically assaulted him demanding to execute the documents in favour of defendants 5 and 6 for payment of Rs. 7,75,000/- that it was in such circumstances, that defendants 1 to 4 executed the document in favour of defendants 5 and 6 as a result of force exerted on them, that the marriage ceremony of the 4th defendant was fixed on the next day and hence there was no other way but to heed to the demands of the police, that defendants 5 and 6 along with two police men took defendants 1, 2 and 4 to the document writer Jose who is a close

associate of the 5th respondent and came back with him to his Office from where a document styled as an agreement was written up, and that thereafter, they returned to the office of the Circle Inspector who coerced them to sign the document as also the blank paper as stated earlier. They prayed that the suit be dismissed.

4. The court below raised the following issues for trial:

1. Whether the coercion contended in the written statement is true?
2. Whether the suit promissory note is a fabricated document?
3. Whether the promissory note was supported by consideration?
4. Whether the plaintiff is a bona fide holder in due course of the promissory note?
5. What amount if any is due to the plaintiff and who are all liable to pay the same?
6. Reliefs and costs?

5. On the side of the plaintiff, he was examined as PW.1 and the document writer as PW.2. Exts.A1 to A6 were also marked. On the side of defendants, the third defendant was examined as DW1 and Exts.B1 to B3 were marked. Marking of Exts. B1 and B3 were objected to by the plaintiff, they being Photostat copies and it was subject to such objection that the marking was made. Ext.B2 is admitted by the plaintiff which is a karar dated 24.4.1997 entered into between Abdul Azeez and the third defendant.

Ext. B1 is the copy of a complaint said to have been submitted before the Circle Inspector of Police and Ext.B3 is the copy of the compensation liability deed. Issue Nos. 1 to 3 were tried together. The plaintiff is the holder in due course of Ext.A1 promissory note. According to him, defendants 1 to 4 jointly executed Ext.A1 in favour of defendants 5 and 6 which is a promissory note on demand to repay the amount mentioned therein or order. On 13.3.1998, the same was endorsed in favour of the plaintiff by defendants 5 and 6 after receipt of consideration. the plaintiff, after repeated demands by defendants 1 to 4, for repayment of the amount, but in the absence of any response or payment, the suit was laid for the plaint amount with 18% interest. The case as set out in the plaint was supported by the evidence of PW.1. The third defendant gave evidence in support of his contention as raised in the written statement. Besides the oral testimony of DW.1, there is no other evidence to support the plea of coercion or influence exerted on the third respondent or to show that some blank paper was got signed from him which was subsequently made as a promissory note Ext.A1. Even though DW.1 had stated in his cross examination about a complaint said to have been given by his mother, he admitted of not having enquired as to what happened to that complaint later. Neither the Circle Inspector nor any other police officials were summoned

to prove the case of the defendants. The alleged complaint said to have been made to the higher officials were also not brought on record by adducing any evidence by summoning the officer to whom the said compliant was given. Even though a copy of the indemnity agreement (Ext. B3) said to have been written by the document writer PW.2 in which defendants 1 to 4 have affixed their thumb impression was produced by the third defendant along with his proof affidavit on 4.7.2003, admissibility of the same was objected to by the plaintiff. Ext. B1 is the Photostat copy of the complaint said to have been made to the higher authorities in the Police Department which were also produced along with the proof affidavit. According to the defendants, Ext. B3 is an agreement written by PW.2 on 26.9.1997 night. But this was not confronted to while PW.2 was in the box. According to the plaintiff, Ext.B3 was not the document which was shown to him in chief examination. Exts. B1 and B3 were held to be not certified copies or true copies taken from the original and attested as true copies. According to DW.1, he got Ext.B3 from the Office of PW.2 by his friend Joy, who managed to get in some way. But the said Joy was not examined. According to the third defendant, he got the same only in the first week of July. Though according to DW.1 the agreement was got signed from the police station along with another blank paper and even according to the

third defendant, defendants 1, 2 and 4 were at that time in the police station, none of them were examined to support his case and no steps were taken to call for the originals of the agreement from the office of PW.2. According to DW.1, Joy took the copy of the same from the office of PW.2 who was in custody of the said document. No attempt was made to call for the originals of Exts. B1 and B3 or to examine any witness to prove the existence of such documents. They have also not sought permission to adduce secondary evidence regarding Exts.B1 and B3. The court below, after considering the evidence as discussed above, came to the conclusion that those documents cannot be admitted in evidence even as secondary evidence.

6. Ext. B2 is an agreement executed between the third defendant (DW1) and one Abdul Azeez regarding the sale of cars, where the value of the vehicles are mentioned. As per this agreement, the third defendant has to pay the amounts mentioned therein for the cars to Abdul Azeez and he is entitled to fix the price and take excess amount as commission. The entrustment of the vehicle by Abdul Azeez to the third defendant is beyond dispute. the version of DW.1 that the price of the vehicle was directly paid to Abdul Azeez by defendants 5 and 6 is therefore, belied by Ext.B2 as regards the payment aspect is concerned. The court below, in such

circumstances, found that the oral testimony of DW.1 is against the recitals in Ext.B2 agreement and no reliability can be placed on his evidence regarding this aspect. There was no reliable evidence regarding coercion and undue influence from police station as stated by DW.1. Even the parties to the documents who are defendants 1, 2 and 4 are not examined. The documents were also not summoned to the police station. No police officer was examined. Hence the case that a stamped blank paper was got signed which was subsequently made use of as a promissory note (Ext.A1) and some other agreement were also executed by defendants 1 to 4 jointly based on such coercion was rejected.

7. Coming to the evidence on the plaintiff's side, PW.2 is the document writer. According to him, Ext.A1 promissory note was prepared by him in his own hand writing and he saw the defendants affixing their signature in Ext.A1. According to him, he had even seen receiving consideration from defendants 5 and 6 and later, the plaintiff met him and asked him regarding the promissory note stating that he intends to purchase Ext.A1. Ext.A1 promissory note was prepared from the house of the first defendant and defendants 1 to 4 had affixed their signatures. The court below found that Ext.A1 was executed by defendants 1 to 4 in favour of Defendants 5 and 6 for valid consideration and that it is not a fabricated

document. It was also found that it was not executed by coercion; but it is supported by consideration. Those issues were found in favour of the plaintiff.

8. Learned counsel Sri. Subramaniam, appearing for the appellants contended that the court below went wrong in refusing to rely on Ext.B3. According to him, PW.2 has admitted in cross examination that it was written by him. Defendants 5 and 6 remained ex parte and defendants 1 to 4 denied the acceptance of any money from Defendants 5 and 6. There was only the uncorroborated version of PW.2 for proving consideration and when the defendants having denied passing of consideration for the promissory note, the burden is on the plaintiff to prove the same, which they have not discharged. Hence presumption under Section 118 of the Negotiable Instruments Act is not available either to the 5th defendant or to the 6th defendant and in consequence, to the plaintiff. This vital aspect is overlooked by the court below. He also placed reliance on the certified copies of the petitions, objections and orders passed by the Metropolitan Magistrate, Bangalore which are documents produced before this Court to show that the promissory note executed is without consideration. According to him, for arriving at a final decision, evidence will have to be adduced and the matter be remanded to the trial court with necessary

direction. He has also submitted that the application I.A. 3503/2003 filed by the appellants to summon defendants 5 and 6 was wrongly dismissed by the court below. In the common order passed by the court below in I.A. Nos. 3501, 3502 & 3503/2003 dated 7.7.2003, it was found that defendants 5 and 6 are in the position of the plaintiff and so they cannot be summoned at the instance of the other defendants; however, it can be done at the discretion of the court after closing of the evidence. But in the judgment under appeal, on the point as to whether Defendants 5 and 6 ought to have been summoned is not dealt with. I.A. 3503/2003 was a petition for summoning defendants 5 and 6 to be called as witnesses which was dismissed by the court below overlooking Order 16 Rule 14 of the Code of Civil Procedure. Defendants 5 and 6 had filed petitions under Sections 451 and 457 Cr.P.C for getting release of the vehicles. The very fact that they got release of the very same vehicles from Bangalore Court itself is a proof to show that they want those cars also besides the value of the pro-note alleged to have been endorsed in favour of the plaintiff for valuable consideration. Hence this is an act of mala fide and therefore, collusive also and no consideration was also paid. The presumption, if any, under Section 118 of the negotiable Instruments Act has been rebutted in the light of the documents sought to be produced in the appeal. The

pronote in favour of Defendants 5 and 6 is for Rs.7,75,000/ which was endorsed on 30.3.1998 after receiving the cash. But Ext.A6 extract of the plaintiff's Bank account shows that on 16.3.1998 Rs. 4 lakhs and on 28.3.1998 Rs. 1,50,000/- alone is seen to have given to Simon K. Francis and Biju (Defendants 5 and 6) respectively and no amount is seen drawn after those dates on which day, the endorsement is said to have been made. The total amount drawn from the Federal Bank by Defendants 5 and 6 comes to Rs. 5,50,000/- only. There is no explanation how the balance of Rs. 2,25,000/- is paid on 30.3.1998 by the plaintiff to defendants 5 and 6. The endorsement that entrustment was made after receipt of full consideration is not fully proved at least in respect of an amount of Rs. 2,25,000/-.

9. Before we consider these contentions on behalf of the appellants, we shall first dispose of the petitions filed by the appellants herein seeking to produce certain documents. I.A.516/2004 is a petition filed under Order XLI Rule 27 of the Code of Civil Procedure seeking permission to produce certain documents in the appeal. There are about 13 documents produced along with the affidavit. Sl. No.1 is a petition for release of motor vehicle Reg. No. KA-11/M/7878 filed before the Additional Chief Metropolitan Magistrate, Bangalore, filed by the 5th defendant. Sl. No.2 is a similar

petition by Simon K. Francis filed before the same court for release of Vehicle No. KA-11/M/8001. Sl. No.3 is the written objection by Harichandra Reddy seeking release of KA-11/M/7878 to him. Sl. Nos. 4 and 5 are B register extracts in respect of the above two vehicles. Sl. No.6 is a vakalath executed by Biju K.V. in favour of Advocates at Bangalore. Sl. No.7 is the surety bond executed by Jose K. Francis for release of Motor Vehicle 8001. Sl. No.8 is the Indemnity bond executed by Simon K. Francis before the First Additional Chief Metropolitan Magistrate, Bangalore. Sl. Nos. 9 and 10 are surety bonds executed by Jose, son of Francis and Basavaraju for release of Motor Vehicle 8001. Sl. No.11 is an order passed by the First Additional Chief Metropolitan Magistrate, Bangalore for release of Motor Vehicle 8001 in crime No. 246/1997. Sl. No. 12 is an indemnity bond executed by Simon K. Francis for release of the above said vehicle and Sl. No. 13 is a surety bond executed by Suresh for the said purpose.

10. In the affidavit filed in support thereof, it is averred that after the decree in O.S. 285/1998, the appellants came to know about the complaints filed by Defendants 5 and 6 before the Additional Chief Metropolitan Magistrate Courts, Bangalore under Section 451 and 457 of the Code of Criminal Procedure for release of two vehicles bearing Reg. No. KA-11-M-

7878 and KA-11-M-8001, which were taken possession by the Bangalore Police from them. Objections were called for and after hearing all the parties, the learned Magistrate passed an order on 10.11.1997 releasing the above said vehicles to defendants 5 and 6 on execution of indemnity and security bonds. The directions in the order were duly complied with by those defendants and the appellants were not aware of the complaints by Defendants 5 and 6 and the orders passed by the Court, as aforesaid and it was after much search in different Magistrate Courts at Bangalore City and Suburbs that the documents could be traced out. According to the appellants, the documents produced in this appeal have a real and direct bearing on the question to be adjudicated and there is no willful negligence or laches on their part for not producing those documents earlier.

11. This application was filed along with the appeal memorandum. No counter was filed until 8th September, 2007. So however, during the course of hearing, a counter affidavit was filed by the first respondent on 8.9.2007 opposing the prayer made for receipt of additional documents. Besides, as per the averments in the counter affidavit, documents 1 to 14 produced have no relevance in the case. It is admitted that orders were passed by the First Additional Chief Metropolitan Magistrate Court, Bangalore for release of the vehicle involved in Crime No. 246/1997 to the

5th defendant, but he was not given release of the same. The State challenged the above order before the Sessions Court who set aside the above order and hence at no point of time, after repossession of the vehicle by the police in 1997, it came to the possession of defendants 5 and 6. Further, no ground under Order 41 Rule 27 CPC is attracted and those documents were in existence when the matter was tried by the trial court and the appellants were aware of these documents. On the same day, the first respondent filed I.A. 3345/2007 seeking a similar relief to produce an affidavit sworn to by the second respondent and I.A. 3436/2007 dated 15th September, 2007, seeking to produce the certified copy of the order in Crl. R.P. 311/1997 passed by the Principal City Sessions Court, Bangalore, dated 9.1.1998.

12. We find that the documents produced as per I.A. 516/2004 are documents related to the release of the vehicle through the Metropolitan Magistrate Court and the petitions filed for such purpose and the security documents said to have been filed as a condition for such release. The appellants are not parties therein and there is no reason to disbelieve the averments made in the affidavit that they came to know about these documents only later in point of time. Defendants 5 and 6 who remained ex parte in the suit and who were the purchasers of the vehicles in question,

have not filed any objection against the receipt of these documents earlier. Further, the first respondent himself has sought to produce the appellate order passed in the case relating to the release of the vehicle. In these circumstances, I.A. 516/2004 filed by the appellants and I.A. 3436/2007 filed by the first respondent are allowed. I.A. 3345/2007 is dismissed since the document sought to be produced is only an affidavit filed by the first respondent to show that he did not re-possess the vehicle because of the appellate court order. The appellate court order has been produced along with the subsequent I.A. 3436/2007, to receive the same, which is already allowed.

13. Now we shall consider I.A. 4495/2004 which is an application for issuing summons to the Circle Inspector of Police, Thrissur Police Station, to produce the documents mentioned therein, namely, a petition dated 23.9.1997 said to have been filed by the plaintiff and the General Diary kept in the Office of the said Circle Inspector. In the affidavit, it is averred that the appellants earnestly tried for getting the details and number of the petition, and the details were known to them only to days back and hence they could not seek such production before the court below.

14. We have heard both sides. We do not find that the appellant has satisfied that he was prevented by any sufficient cause for causing

production of this document by filing appropriate petition before the court below, though the facts sought to be proved by producing the document were very well pleaded in the written statement. No steps were taken by the appellant before the court below to summon these documents. The failure on the part of the appellants to cause production of these documents taking recourse to Order 16 Rules 6 and 7 is not satisfactorily explained so as to enable him to make such an application before the appellate court. Hence this application is dismissed.

15. The contention based on the documents produced by the appellants along with I.A. 516/2004 is that defendants 5 and 6 had taken steps for release of the vehicles and they have repossessed the same based on the order passed by the Magistrate Court, Bangalore and they are simultaneously seeking to recover the amount said to have been paid for purchase of those vehicles based on the promissory note as endorsed in favour of the plaintiff.

16. It is not disputed before us and for that matter even affidavit is filed by the second respondent admitting the fact that he has made such an application for release. The document was sought to be produced along with I.A. 3345/2007. The First Additional Chief Metropolitan Magistrate Court, as per his order dated 23.10.1997, in an application filed under

Sections 451 and 457 of the Code of Criminal Procedure, in Crime No. 246/97, after rejecting a similar application filed by Harischandra Reddy, directed the complainant State of karnataka to release the vehicle KA11/M/7878 in favour of the petitioner therein, namely, K.V. Biju, son of K.L. Varghese, holding that the said vehicle is no longer required for further investigation and the same was in the custody of the police for a long time and the petitioner had expressed his readiness to produce the same as and when required. Thereafter, a revision was filed as CrI. R.P. 311/1997 before the Principal City Sessions Judge, Bangalore against the orders passed by the First Additional Chief Metropolitan Court in Crime No. 246/1997 dated 10.11.1997 and that court, by an elaborate order, allowed the revision holding that the trial court does not have jurisdiction to entertain an application filed by Simon K. Varghese and to order release of the said vehicle for interim custody particularly when the said vehicle was said to be transferred in an application filed by the police, Mathunga Police Station for investigation of Crime No. 370/97 of that police station, since that case was to be tried by the jurisdictional Magistrate in Bombay. It was also held that the learned Magistrate was not correct in relying upon the registration certificate since the State had a case that it is a manipulated one. The court also took notice of the contention of Ramachandra Dixit who is the defacto

complainant in Crime No. 397/1997 who claimed to be the registered owner of the vehicle in question and held that it is not possible to presume based on the Registration Certificate alone that the respondent therein was the registered owner of the vehicle. Hence, according to the revisional court, the learned Magistrate ought to have directed the respondent to approach the Jurisdictional Magistrate Court, Bombay for such a relief. It was further found that the investigation is not over in the present case and the charge sheet has not been laid.

17. Thus, it can be seen that the vehicle KA-11/M/8001, though was ordered to be released in favour of the 5th respondent, by the Magistrate Court at Bangalore, the said order was reversed by the Sessions Court in revision. As such, no reliance can be placed on the order of the Magistrate Court, when such an order is no longer in force. Further, the present suit is instituted by the plaintiff based on an endorsement made in the promissory note by the original promisees Defendants 5 and 6 in whose favour the promissory note was executed by the appellants. Thus, the plaintiff was the holder in due course of the negotiable Instrument and the only question is as to whether the promissory note was executed for consideration and whether the presumption under Section 118 of the Negotiable Instruments Act is available and whether such presumption has been satisfactorily rebutted by

cogent evidence by the defendants so as to shift the burden on the plaintiff to be discharged, which has to be decided on the materials produced in the case. Hence we shall presently refer to the contentions raised in the appeal with regard to the correctness or otherwise of the judgment under appeal and the finding on the relevant issues arising for consideration.

18. The plaintiff, who is the holder in due course of the promissory note, adduced evidence in support of his case while examined as PW.1. PW.2 is a document writer who supports the case of the plaintiff. The promissory note is Ext.A1 produced in the case, which is dated 26.9.1997. Even according to the defendants, they had signed the promissory note, but according to them, the said promissory note was on a blank paper and signed by them, at the instance of Defendants 5 and 6 in the police station. No steps were taken by the appellants to adduce any evidence in support of their plea that ext.A1 promissory note was a concocted document and their signatures were obtained in a blank paper as contended by them. Even though the third defendant would admit the presence of Defendants 1, 3 and 4 in the Police Station, none of them were examined to corroborate the version of DW.1. None of the police officers were summoned. No other independent evidence is adduced in the case. Even though, according to the appellants, Exts.B1 and B3 documents were marked, we have perused those

documents and we find that those documents were marked subject to the objection by the plaintiff and the court below had not admitted those documents. Ext.B1 is a copy of the complaint submitted before the Circle Inspector of Police, which is only a secondary evidence. No permission was sought for to produce a copy of this complaint by way of secondary evidence and no steps to cause production of the original were taken before the trial court. Neither the Circle Inspector of Police nor other police officer was examined in the case to prove that such a complaint was made by the defendants. Ext.B3 was produced along with the proof affidavit which is an agreement said to have been written by PW.2 on 26.9.1997 night. According to DW.1, this was prepared by PW.2; but this was not marked through PW.2 and only certain questions were put to him. He was recalled and it was when he was re-examined that it was sought to be produced and marked, which was objected to by the plaintiff. It is also the case of the plaintiff that what was shown to him, though not marked on the earlier occasion was not Ext.B3 which was sought to be produced later, when recalled. At any rate, Ext. B3 is not a certified copy nor a true copy certified to have been taken from the original. At any rate, the definite case of DW.1 is that he got a copy of this agreement Ext.B3 from one Joy from the Office of PW.2. thus, the custodian of this document is not the

defendant, but PW.2. Even on a consideration of Ext. B3, it will only show that the defendants have agreed to pay the amount to Defendants 5 and 6 being the consideration received by them for the vehicle which was subsequently seized by the police. This will further show that the defendants have admitted their liability to repay the amount to Defendants 5 and 6 and hence the argument that the agreement was executed without any consideration is belied by Ext.B3 itself. Even though Ext.B3 is stated to be an agreement vitiated, as according to the defendants, they were induced or threatened to have signed those documents, no satisfactory evidence was adduced to show that the said document was vitiated. At any rate, the plaintiff was not a party to these documents. Hence, even if Ext.B3 is looked into, that will only show that there was a transaction between defendants 5 and 6 in favour of defendants 1 and 4 and through Defendant No.3 the vehicles were purchased by defendants 5 and 6 after paying consideration, though those vehicles were seized by the police as a result of Defendants 1 to 4 had agreed to return the money. According to the learned counsel for the appellant, if Ext.B3 is accepted, it will disprove consideration under Ext.A1. According to him, no cash consideration was received under Ext.A1. On the other hand, learned counsel for the respondent Sri. T. Krishnanunni would submit that the promissory note is

admitted to be signed by Defendants 1 to 4, as such its execution is proved and therefore, there is a presumption in favour of the plaintiff under Section 118 of the Negotiable Instruments Act, he being the due holder of the promissory note for valid consideration paid. Hence the presumption section 118 is available to the plaintiff which has not been rebutted by any evidence in the case by defendants 1 to 4. According to him, the right of the defendants is only to show that no consideration was passed on and even if their contention based on Ext.B3 is to be considered, it admits of no doubt that there was consideration for the promissory note since Defendants 5 and 6 who parted with money for purchase of vehicle lost both money and vehicle because the vehicles were seized later and hence they are bound to return the amount with interest. Both placed reliance on decided authorities in support of their cases.

19. In **M/s. U. Ponnappa Moothan Sons, Palghat v. Catholic Syrian Bank Ltd.** (AIR 1991 SC 441) it was held by the apex court that mere failure to prove bona fide or absence of negligence by holder would not negative his claim of being a "holder in due course". It was held as follows:

...."A holder, to be a holder in due course, must not only have acquired the bill, note or cheque for valid consideration but should have acquired the

cheque without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title. This condition requires that he should act in good faith and with reasonable caution. However, mere failure to prove bona fide or absence of negligence on his part would not negative his claim. But in a given case, it is left to the court to decide whether the negligence on part of the holder is so gross and extra ordinary as to presume that he had sufficient cause to believe that such title was defective. However, when the presumption in his favour as provided under Section 118(g) gets rebutted under the circumstances mentioned therein then the burden of proving that he is a 'holder in due course' lies upon him. In a given case, the court while examining these requirements including valid consideration must also go into the question whether there was a contract express or implied for crediting the proceeds to the account of the bearer before receiving the same."

20. In that case, the holder firm made necessary endorsement in the two cheques in favour of the plaintiff Bank and the Bank endorsed "payee account credited". The firm withdrew this amount and there is no dispute about it. In the absence of the cheques being crossed as "not negotiable" nothing prevented the plaintiff Bank to purchase the cheques for a valuable consideration and the presumption under Section 118(g) comes to its rescue and there is no material whatsoever to show that the cheques were obtained in any unlawful manner or for any unlawful consideration.

21. In **Bharat Barrel and Drum Manufacturing Co. v. Amin Chand Payrelal** (AIR 1999 S.C. 1008) the apex court held that 'once the execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would dis-entitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The Court may not insist upon the defendant to disprove the existence of consideration by leading direct

evidence as existence of negative evidence is neither possible nor contemplated and even if led is to be seen with a doubt. the bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption the defendant has to bring on record such facts and circumstances, upon consideration of which the Court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist.'

22. In that case, the defendant alleged that the promissory note had not been executed for the value received as mentioned therein but was executed by way of collateral security and to disprove the consideration of the promissory note he had brought certain circumstances to the notice of the court which he wanted to probabilise by leading evidence. The evidence led by him in that regard was not acceptable. In the absence of disproving the existence of the consideration, the onus of proof of the legal presumption in favour of the plaintiff could not be shifted. That was a case where the plaintiff had produced evidence which was in fact evidence in rebuttal of the evidence produced by the defendant. Even though the

plaintiff's evidence was not believed yet the same could not be made basis for rejecting the claim because the obligation upon the plaintiff to lead evidence for the purposes of 'to prove his case' could not have been insisted upon because the defendant has prima facie or initially not discharged his onus of proof by showing directly or probabalising the non existence of consideration.

23. In **Kunhikalandar v. Abdul Khadar** (1971 KLT 620) a learned Judge of this Court considered the scope of presumption under Section 118 (a) in a case where the promissory note mentioned the consideration as paid in cash and the plea of the plaintiff that part of consideration paid in cash and part by cheque subsequently. The effect of such plea with reference to the presumption under Section 118 A was considered and held that the word "for consideration" Section 118(a) are general in character. There is no presumption either that the instrument is supported by the consideration which is mentioned in the negotiable instrument or the consideration which is in the nature of what is mentioned therein. The fact that the plaintiff in a suit on a promissory note admits that the consideration is not of the nature mentioned in the promissory note does not in any way affect the rule of presumption under Section 118(a) as that rule enables only a presumption as to the existence of consideration being drawn. The presumption is

necessarily limited to one regarding the existence of consideration. The fact that the payment is not on the date of the execution of the promissory note is not sufficient to shift the burden on the plaintiff and rebut the presumption under Section 118. The pleadings of the plaintiff was held in any way go against the application of the presumption of S.118(a).

24. In **Alex Mathew v. Philip Philip** (1973 ILR 70) a Division Bench of this Court held that the fact that a particular form of consideration pleaded by the plaintiff had not been proved will not negative the presumption under the section and will not enable the court to come to the conclusion that the instrument is not supported by any consideration at all. That presumption must still be there unless the court is able to say, on the facts and circumstances and the evidence let in, either by the defendant who attempted to rebut the presumption, or by the admissions made by the plaintiff or from other attendant circumstances which may be referred to, that the presumption had been rebutted and the rebuttal must be that the instrument is not supported by consideration at all.

25. In **T. Kutty Sankaran Nair v. Isappan Joseph** (1990(2) KLJ 491) a Single Bench of this Court held that when there is a presumption under Section 118 of the Negotiable Instrument Act that consideration has passed for execution of the document in order to rebut the presumption, the

defendant has to prove that no consideration has passed. If it is found that some form of consideration passed that is sufficient and it is not necessary for the plaintiff to prove that particular consideration mentioned in the document has passed. Even if the plaintiff fails to prove that particular consideration mentioned in the promissory note had passed, still presumption continues under Section 118 of the Negotiable Instruments Act and the plaintiff is entitled to succeed on the basis of this presumption unless the defendant rebuts the presumption by establishing that no form of consideration had passed.

26. A careful consideration of the above authorities would clearly show that the presumption under Section 118 of the Negotiable Instrument Act that the promissory note executed was for valid consideration is a rebuttable presumption and it is for the defendants to prove in rebuttal thereof to show that no consideration has passed and not that the nature of the consideration mentioned in the promissory note was wrong and something else. In this case, even going by Ext. B3 the contention of the petitioner that no consideration was passed under Ext.A1 cannot be believed to be true. At best, he could only say that the consideration under the promissory note was the amount due and payable under the agreement. In other words, in the absence of any evidence in rebuttal to show that no

consideration has passed on under Ext.A1, the defendants have not discharged their burden to rebut the presumption in favour of the plaintiff arising under Section 118 of the Negotiable Instrument Act.

27. Regarding the admissibility of Ext.B3 as a secondary evidence, even according to the appellants, these documents were not produced from their custody; but a copy of the agreement was obtained from the Office of PW.2 through another person. The appellants also did not take any steps to cause production of the original. Therefore, in the circumstances, merely because these documents were marked, the admissibility of which was only subject to the objection raised by the plaintiff, it cannot be said that the court below was wrong in not admitting the same. We have already held that even otherwise, if the document is admissible that will in no way improve the case of the appellants that the promissory note was executed without any consideration.

28. In Munusamy Kounder v. Balu ((2002) 2 M.L.J. 230) while considering the scope of Sections 3 and 5 of the Evidence Act, when an objection was raised for marking and when permission was refused, on the facts and circumstances, photo copy of the sale agreement was allowed to be marked. **B. Poornima v. Thoomu Ramdasu** (2006 AIHC 1772) was a case where the plaintiff sought permission to file certified copy of registered

Will executed by the deceased brother of the first defendant in respect of the suit properties. Neither the plaintiff nor the defendant were parties to the said Will and they were only third parties who were not beneficiaries. The original Will was with the legal heirs of the deceased and they had also died and the next generation legal heirs of the deceased were hand-in-glove with the defendants. In these circumstances, it was held that the plaintiff was entitled to adduce document in question as secondary evidence.

29. **Jansirani v. G. Loganathan** ((2007) 4 MLJ 485 (Madurai Bench of the Madras High Court)) was a case where admittedly no notice was issued by the plaintiffs requiring the defendants to produce the original of the partition deed. It was the definite case of the defendant that no such original document was executed and therefore no such document was available in their hands. When that be so, it was held that issuing such notice shall be only an empty formality. The very object of Section 65(a) is to have on record the best evidence by way of primary evidence and to allow the secondary evidence, if only the primary evidence could not be secured. From the definite stand of the defendants that the primary evidence is not with them, it is manifestly clear that the best evidence viz. the primary evidence cannot be secured. Therefore, insisting upon notice will be only an empty formality.

30. In **Sitaram v. Santanuprasad** (AIR 1966 SC 1697) the question as to whether the documents are admissible against the appellant or not arose for consideration. The apex court held that admission of documents means admission of facts contained in the said documents. The facts were not deposed to by any one and the truth of these statements was not in any way tested. To admit them would be prejudicial to the appellant and strictly speaking no provision of law makes the admissions admissible against a person other than the person making them, unless such person can be said to be bound by the admission. Based on this decision, it was argued that once the document is marked, the contents of it stands proved. But this contention of the appellants does not appeal to us. In this case, though Ext.B3 was produced and marked it was not admitted in evidence and it was only marked subject to such objection. Therefore, this is not a case where the document was admitted. Hence on the facts of this case, the principle laid down in the above decision has no application. According to them, that was an agreement executed by the appellants in favour of defendants 5 and 6. These documents were not produced at the time when the appellants gave evidence. It was only in the cross examination of DW.2 that it was attempted to be produced. PW.1 is not even a party to this document. In such circumstances, this could not be treated as an admission against PW.2

or the plaintiff. Therefore, this is not a document admissible as against the plaintiff in order to hold that the contents of the same stands proved as against him. As held by this court, technically it be an admission against the maker; but when the plaintiffs are not parties the question of the contents being proved against the plaintiff did not arise. Reliance was also placed on the decision of the apex court in **P.C. Purushothama Reddiar v. S. Perumal** (AIR 1972 SC 608) wherein it was held that it is not open to a party to object to the admissibility of documents which are marked as exhibits without any objection from such party. But in this case, the document itself was marked only subject to the objection on the other side and as such the decision cited has no application.

31. Nextly it was contended that the court below did not allow the examination of defendants 5 and 6. A Division bench of this court in **Jortin Antony v. Marthanda Varma** (2000(2) KLJ 297) held that a party to the suit has no right as such to insist to summon the opposite party to give evidence. However, the court can only summon the opposite party if there are suitable reasons to exercise the power. The appellant has no right as such to summon Respondents 5 and 6 and he has not been able to substantiate that there are any exceptional reasons to exercise the

discretionary power of this court to do so.

32. In this case, though the appellants/defendants contended that the promissory note was vitiated, as it was executed, according to them, by fraud and coercion at the instance of defendants 5 and 6 before the police station, we have already found that the appellants did not however adduce any evidence in support thereof. Though the alleged agreement Ext.A1 (assuming to be admissible) would show that there was a past transaction between the parties, it cannot be said that the promissory note executed is unsupported by consideration. Further, the appellants have no case except to contend that they have made a complaint before the higher officials in the Police Department which fact they did not establish by adducing any evidence. They did not take any steps by approaching any court of law, civil or criminal, to vindicate their grievance. They had no case that they had initiated any proceedings before any Magistrate court by filing any private complaint, if their case was that their complaints subsequent to the higher officials was not responded to and in case such a complaint was in fact given. They also did not seek for any declaration against the promissory note or the agreement as void at any time. It was only when the suit was instituted for realisation of money that they came forward with a plea in the written statement for the first time that such a promissory note

was executed in the circumstances as pleaded therein. Hence the case of the appellant that the promissory note was vitiated has only to be rejected.

33. Under Section 118 of the negotiable Instruments Act, there is a presumption in favour of the plaintiff which of course is a rebuttable presumption. But no acceptable evidence is adduced in rebuttal of the said presumption to shift the onus on the plaintiff. The judgment and decree passed by the court below does not call for any interference.

In the result, the appeal is dismissed. However, parties to bear their respective costs in this appeal.

P.R. RAMAN,
(JUDGE)

V. K. MOHANAN,
(JUDGE)

knc/-